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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 425

LUCIUS POWERS AND W. E. URICK, PETITIONERS

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES EMERGENCY COURT OF APPEALS*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 63-69) is not yet reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered August 4, 1944 (R. 70). The petition for a writ of certiorari was filed September 2, 1944. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App., Supp. III, Sec. 901

(herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C., Sec. 347).

QUESTIONS PRESENTED

(1) Whether establishment by the Price Administrator of a single maximum price for all table grapes, subject to seasonal variations, discriminated illegally against petitioners or required changes in established business practices in contravention of Section 2 (h) of the Emergency Price Control Act.

(2) Whether the maximum prices for table grapes violated the minimum price standards for agricultural commodities imposed by Section 3 of the Stabilization Act of 1942 (c. 578, 56 Stat. 765, 50 U. S. C. App., Supp. III, Sec. 961).

(3) Whether the establishment of maximum prices for table grapes after the inception of the 1943 shipping season deprived petitioners of property without due process of law.

The petition also seeks to raise a number of questions which may not be urged here since they were not presented to the Price Administrator or to the Emergency Court of Appeals.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, and of the Stabilization Act of 1942, as amended, appear in the Appendix, *infra*, pp. 19-30. The maximum

price regulation involved and the amendments thereto are printed in the Federal Register (8 F. R. 9546, 11589, 16519; 9 F. R. 9509).

STATEMENT

Maximum prices for table grapes were first established by the issuance on August 19, 1943, of Amendment No. 4 to Maximum Price Regulation No. 426. Petitioners filed a protest against Amendment No. 4 on September 27, 1943 (R. 1). Petitioners requested an opportunity to present further evidence, and the Price Administrator afforded them an opportunity to present in written form any further evidence that they might desire (R. 10-11). Additional evidence was filed by petitioners on November 12, 1943 (R. 12).

On December 6, 1943, the Price Administrator issued Amendment No. 14 to Maximum Price Regulation No. 426, which granted part of the relief requested by petitioners (R. 29, 42). On February 2, 1944, the protest was denied insofar as relief had not already been granted (R. 18, 19-31). The Price Administrator's opinion in part relied upon price data compiled by the Department of Agriculture not theretofore incorporated into the record¹ and for this reason,

¹ The Price Administrator's opinion incorporated into the record certain previously unpublished data of the Bureau of Agricultural Economics (R. 31), and took official notice of certain published market bulletins, including *Grapes, 1942* (Federal-State Market News Service) and *Agricultural*

the order of denial afforded petitioners the opportunity to apply for reconsideration of the decision within thirty days thereafter (R. 18, 29). Petitioners did not apply for reconsideration of the Price Administrator's decision, but on March 3, 1944, filed a complaint with the United States Emergency Court of Appeals (R. 47-51). The court rejected all of the objections then asserted by petitioners to the maximum prices in question and dismissed the complaint (R. 63-70).

ARGUMENT

We respectfully submit that the petition presents no ground warranting further review by this Court. No conflict is shown between the decision below and any decision of this Court or of any other court. Nor does the petition raise any important question of federal law which should be decided by this Court; the particular maximum prices involved have been attacked by no other protestants, and the contentions upon which the petitioners here rely have been advanced only in the instant proceeding. Moreover, we believe that the objections urged by petitioners are clearly without merit for the reasons which follow.

Prices (Bureau of Agricultural Economics) (R. 22, 27, 30). Although the published materials were not physically incorporated into the record, they were before the Emergency Court of Appeals by oral stipulation of the parties, and in addition are properly a subject of judicial notice. *Shapleigh v. Mier*, 299 U. S. 468.

THE ESTABLISHMENT OF A SINGLE MAXIMUM PRICE FOR
TABLE GRAPES DOES NOT DISCRIMINATE AGAINST PETI-
TIONERS OR VIOLATE SECTION 2 (h) OF THE EMERGENCY
PRICE CONTROL ACT

The regulation to which petitioners object established a single maximum price applicable to all table grapes, subject to seasonal variations, but without differentiations for varieties, grades, or brands. In the protest petitioners contended that the regulation thereby discriminated against grapes of the Emperor variety and against the better grades and brands of table grapes (R. 5). It was also asserted that fixing such an undifferentiated maximum price contravened the prohibition of Section 2 (h) of the Act against compelling changes in established business practices (R. 4).

Petitioners suggest that it would be better not to "burden this Court with price and mark-up details" (Pet. 16). However, the abstract legal issues which petitioners pose may be evaluated only in the light of an examination of the maximum prices in question and their relationship to historic price levels.

The maximum price for table grapes which petitioners attacked was a f. o. b. shipping point price of \$2.05 per 28-pound lug box, subject to seasonal increases to \$2.30 on November 1 and to \$2.60 on January 1 (R. 24). The maximum price of \$2.05 per lug for early-season sales was far in excess of the unprecedented average grower

return for the 1942 season of \$0.80 per lug (\$57.10 per ton), the difference including an allowance of \$0.37 per lug to reflect the normal price range above the average for sales of the better grades, varieties, and brands (R. 24, 64).²

The regulation was thus constructed in such a manner as to preclude hardship to producers of table grapes which in a normal market would have commanded prices higher than the average. That this is the fact is shown by conclusive evidence discussed in detail in the opinion of the court below (R. 66). Thus, petitioners urge that the establishment of a single maximum price discriminates against the Emperor variety of table grapes. It is illuminating to compare the early-season maximum price of \$2.05 per lug with the following price range for Emperor grapes shipped in a corresponding period in preceding years:³

² The maximum price of \$2.05 per lug consisted of the average grower return in 1942 of \$0.80 (\$57.10 per ton) plus \$0.88 for pre-shipping expense and \$0.37 to reflect the deviation above the average for sales of higher-priced grapes (R. 64). Evidence supplied by petitioners indicated that the allowance for pre-shipping expense may have been too ample (R. 15). *Prices Received by Growers for Fruit and Nut Crops* (Bureau of Agricultural Economics, U. S. Dept. of Ag., Nov. 1943), p. 24, shows that the average return to growers of California table grapes in 1942 of \$57.10 per ton compared with \$36.20 in 1941, \$21.70 in 1940, and \$18.60 in 1939. The appropriate parity price for grapes, published by the Secretary of Agriculture in *Agricultural Prices* (Bureau of Agricultural Economics, June 19, 1944) was \$48.30 per ton.

³ *Grapes, 1942* (Federal-State Market News Service), 15.

Year:	Price range per lug	
1942-----	\$1.50	-\$1.80
1941-----	.95	- 1.05
1940-----	.62½	- .75

The maximum price of \$2.05 applicable to all table grapes was thus sharply above even the high 1942 price for Emperors, and as the court below observed, "173⅓% greater than the highest reported 1940 price for Emperors" (R. 66).

It is true that establishing a single maximum price for all table grapes led to a higher level of maximum prices than would have been necessary if separate maximum prices could have been established for different varieties, grades, and brands. Prior to the issuance of the regulation, the Price Administrator gave consideration to the possibility of fixing separate maximum prices for different varieties of table grapes, but, upon the advice of the industry, rejected such a plan as wholly unworkable. Thus, the California table grape committee unanimously made the following recommendation:

Therefore, if price ceilings *are* established we recommend *one over-all ceiling* for *all* varieties of table grapes, with due allowance for the actual price ranges as they exist. We recognize such an over-all price ceiling would have to be relatively high, but we are of the opinion that any price ceilings by varieties would be so complicated and so difficult of enforcement they would break down completely. Neither the Government nor our industry

can afford to have such an eventuality occur. (R. 60.)

It could hardly be reasonably urged that the Price Administrator was arbitrary or capricious in adopting this industry recommendation as a basis for the structure of the maximum price regulation.

The suggestion that separate maximum prices should have been established for the various varieties of table grapes must be premised upon the assumption that there is a reasonably stable historical price relationship between the different varieties which could be embodied in a regulatory structure. Petitioners, however, did not present any evidence of such price relationship. On the contrary, as the court below observed, the evidence of past prices of eight major varieties of table grapes incorporated into the record by the Price Administrator shows that Emperors, while commanding the second highest price in 1942, ranked third in 1938, fourth in 1936 and 1939, and fifth in 1937, 1940, and 1941 (R. 23, 30). As the court below recognized, in the light of such fluctuating price relationships in a normal market, the Price Administrator was fully justified in not attempting to establish a structure of separate maximum prices in terms of varieties. (R. 68.)

The protest alleged that hardship might result to shippers packing table grapes under special brand names, and the petition elaborates upon

these possibilities (Pet. 2-3). However, the court below found that "complainant Urick who made the specific charge that the Regulation unlawfully discriminates against the grapes which he sells under the brand name 'Poinsettia', has offered no evidence to establish this contention" (R. 68). As the court observed, such unproved allegations do not merit further consideration.

Petitioners further contend that a single maximum price for all table grapes is invalid as requiring changes in established business practices contrary to the prohibition of Section 2 (h) of the Act. As the court below found, this charge was wholly unsupported by facts. Petitioners have pointed to no prohibition in the regulation against the continuance of their customary business operations or, in fact, to any prohibition other than a limitation upon the prices which they may charge. Consequently, it is patent that there is no merit to petitioners' claim that the regulation contravenes the "business practices" provision of the Act. *Philadelphia Coke Co v. Bowles*, 139 F. (2d) 349 (Em. App. 1943).

For the first time in the petition it is urged that the regulation is invalid as an attempt to "standardize" table grapes or to eliminate or restrict the use of trade and brand names, in violation of Section 2 (j) of the Act (Pet. 24-28). However, these contentions, apart from their obvious lack of substance, cannot avail petitioners. The assertion of new objections at this stage of

the proceeding is foreclosed both by the explicit provisions of Section 204 (a) of the Emergency Price Control Act and by orderly procedure with respect to review in this Court. See *Marshall Field & Co. v. National Labor Relations Board* 318 U. S. 253.

II

THE MINIMUM PRICE STANDARDS FOR AGRICULTURAL COMMODITIES PROVIDED BY THE STABILIZATION ACT OF 1942 DID NOT PRECLUDE THE ESTABLISHMENT OF PRICE CONTROL OVER TABLE GRAPES OR OTHERWISE INVALIDATE THE REGULATION

The protest filed by petitioners with the Price Administrator contained the general allegation that the maximum price for table grapes was "below any price which could, in view of the evidence, have been fixed" pursuant to the provisions of the Stabilization Act of 1942, which imposed additional minimum price standards specially applicable to agricultural commodities (R. 3). The only evidence submitted in support of this allegation related to compliance with the requirement of Section 3 that maximum prices for agricultural commodities reflect "increased labor or other costs to the producers of such agricultural commodity." The opinion of the court below showed this contention to be without substance (R. 65-6), and it has now been abandoned by petitioners.

In the petition a new objection based upon the Stabilization Act of 1942 is for the first time asserted. It is now contended that alleged fail-

ure of the Secretary of Agriculture to determine and publish the "highest price" received between January 1 and September 15, 1942, by growers of table grapes precluded the Price Administrator from establishing any maximum prices for this commodity, regardless of the level at which the ceiling should be imposed (Pet. 17-20). This objection may not now be raised, since it was presented neither to the Price Administrator nor the Emergency Court of Appeals.

In any event, the contention is without merit. The language of the Stabilization Act provides only that certain price data, as determined and published by the Secretary of Agriculture, shall constitute a floor below which maximum prices may not be established. Petitioners refer to no statutory provision which lends support to the suggestion that any action by the Secretary of Agriculture other than the approval of maximum price regulations governing agricultural commodities expressly provided for in Section 3 (e) of the Emergency Price Control Act should constitute a condition precedent to the establishment of maximum prices.

Nor is there basis for the assertion that the Secretary of Agriculture failed to determine and publish the appropriate minimum price standards applicable to table grapes. The legislative history of the Stabilization Act of 1942 makes it clear that compliance with the minimum standards of "parity" and "prices received by * * * pro-

ducers" must be ascertained by reference to the long-established procedures for the determination and publication of such data in the bulletins of the Bureau of Agricultural Economics.⁴ Such parity prices and prices received by producers for table grapes have been periodically determined and published by the Secretary of Agriculture. For most agricultural commodities, monthly average prices received by producers are determined and published. For some of the seasonal commodities, including grapes, the determination of prices received by producers has customarily taken the form of a season average price. That Congress intended that the minimum price standards should be based upon this settled administrative practice is demonstrated by the fact that tables of the proposed legal minimums which included such season average prices, and more particularly which included the season average price for grapes, were submitted to the Senate Banking and Currency Committee and formed the basis for discussions leading to passage of the Stabilization Act of 1942.⁵

Petitioners contend in the alternative that even if the Price Administrator had authority to establish maximum prices for table grapes the

⁴ Hearings before the Senate Banking and Currency Committee on S. J. Res. 161 (77th Cong., 2d Sess., 1942), pp. 44-47, 57, 85-6, 142, 210, 217; 88 Cong. Rec. 7204, 7217, 7234, 7481.

⁵ Hearings before the Senate Banking and Currency Committee, *supra*, p. 45.

maximum prices set forth in the Regulation are inconsistent with the "highest price" provision of Section 3 of the Stabilization Act of 1942 (Pet. 20-23). This contention fails for a number of reasons. In the first place, the Stabilization Act clearly requires the Price Administrator to conform to the standards "as determined and published by the Secretary of Agriculture," and petitioners have referred to no price determined by the Secretary which is inconsistent with the regulation. In fact, as has already been shown (note 2, p. 6, *supra*), the maximum prices in question far exceed both the parity and grower return prices which the Secretary of Agriculture has determined and published.

The lack of substance to petitioners' contention is further revealed by their concession that "there is nothing * * * in the entire record to indicate specifically and definitely what the highest 1942 price was between January 1 and September 15, 1942 * * *" (Pet. 18). Under Section 204 (b) of the Emergency Price Control Act, petitioners have the burden to "establish * * * that the regulation * * * is not in accordance with law * * *." Not only did petitioners offer no evidence to show that the maximum prices were invalid even under their construction of Section 3 of the Stabilization Act, but price data discussed by the court show the maximum price established by the regulation to

be sharply above the highest reported prices received in the statutory 1942 period (R. 65).

III

PETITIONERS HAVE NOT BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW BY PROCEDURAL ERRORS IN THE PROTEST PROCEEDING OR BECAUSE OF ESTABLISHMENT OF THE MAXIMUM PRICES AFTER THE INCEPTION OF THE 1943 SHIPPING SEASON

Petitioners' statement of facts criticises the proceedings before the Price Administrator on the ground that the Price Administrator's opinion in the protest proceeding was based upon evidence which petitioners had no opportunity to refute (Pet. 4). As has already been indicated, this assertion is contrary to the facts. Since the opinion relied in part on material not theretofore part of the protest record, the order accompanying this opinion afforded petitioners the opportunity to apply for reconsideration of the decision (R. 18, 29). Petitioners did not apply for reconsideration of the Price Administrator's decision, nor did they in the Emergency Court of Appeals assert that they had not been given an opportunity to rebut the evidence upon which the Price Administrator relied (R. 47-51). Petitioners' intimation that they were denied a full opportunity to substantiate their case or to meet the Price Administrator's evidence is thus wholly without foundation.

Petitioners also suggest that the Price Administrator delayed unduly in determining their pro-

test. This contention likewise is without substance. As petitioners now concede, if in the course of the protest proceedings they were of the opinion that the Price Administrator was unduly delaying action, they could have filed a petition for a writ of mandamus in the Emergency Court of Appeals to require the Price Administrator to expedite his determination (Pet. 33). Petitioners, having failed to avail themselves of this remedy, now have no standing to assert that illegal delay occurred in the course of the administrative proceedings.

Petitioners now rely principally upon the contention that the Price Administrator could not legally have imposed any maximum prices for the table grapes produced in the 1943 season since maximum prices were not announced in advance of the inception of that season. It could hardly be contended that alleged lateness in establishing maximum prices for the 1943 season rendered invalid the price-control program in its application to subsequent years. As to the 1943 season itself, petitioners concede that they "may not recover from anyone such losses as they may have incurred as a result of their operation under the regulation during the 1943 season, regardless of the fact that the regulation may be declared wholly invalid" (Pet. 35). Consequently, it does not appear that petitioners' objection to the date of establishing price control for the 1943 table-grape season now presents a justiciable contro-

versy meriting review in this Court. *California v. San Pablo & T. R. Co.*, 149 U. S. 308, 314.

Nor is there merit in petitioners' contention that the Price Administrator acted unreasonably with respect to the date of issuance of maximum prices for the 1943 table grape season. The reasons for the date of initial establishment of maximum prices for table grapes were set forth as follows in the Price Administrator's opinion:

During the summer of 1943 the Office of Price Administration was attempting to meet the huge task of establishing enforceable dollars and cents maximum prices for fresh fruits and vegetables with all the speed that was consistent with the establishment of fair and workable regulations. Maximum prices for table grapes were established as soon as practicable, after extensive consultation with the industry and while the bulk of the grape crop was yet unsold. (R. 21.)

In the inception of any price control program, there is of course the certainty that some delay will occur before the validity of the regulation can be finally determined. This fact, however, was faced squarely by this Court in *Yakus v. United States*, 321 U. S. 414. In that case this Court determined that in view of the evils inherent in delayed or interrupted price control, the choice in favor of continued controls pending review was one fully within congressional power. The Court stated (p. 439):

If the alternatives, as Congress could have concluded, were wartime inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation.

As was pointed out by the court below, the essence of petitioners' argument is that provisions for interlocutory relief should have been made available with respect to seasonal commodities such as table grapes. Since this proceeding does not involve an application for interlocutory relief, this would hardly appear an appropriate proceeding to test that issue. Nor is there substance to the contention that special provisions for interlocutory relief should have been made available with respect to a commodity such as table grapes. Although the private interest in being promptly relieved of price control is heightened in the case of a seasonal commodity, the public interest in such a case is increased to an equal or greater degree, since interlocutory relief from price regulation of a seasonal commodity might permit the entire year's production to escape control. In any event, the contentions that interlocutory relief should have been available and that petitioners have been deprived of property without due process of law are foreclosed by the lack of merit to petitioners' objections to the

propriety of the maximum prices to which they have been subject.

CONCLUSION

The decision below is clearly correct, and does not warrant further review. The petition should therefore be denied.

Respectfully submitted.

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OCTOBER 1944.

